

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES  
STATE OF MONTANA

<p>In Re: Ethics Complaint of TRAP FREE MONTANA PUBLIC LANDS v. MONTANA FISH, WILDLIFE, AND PARKS.</p>	<p>CAUSE NO. COPP-2014-ETH-005</p> <p style="text-align: center;">PROPOSAL FOR A DECISION</p> <p style="text-align: center;">HEARINGS EXAMINER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW</p>
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**BACKGROUND**

On June 14, 2014, Montana citizens saw members of Montana Trappers Association (MTA), a 2014 incidental political committee, utilizing State of Montana property to advocate against a ballot issue at the Hamilton Farmer's Market. The state property used was a Montana Fish, Wildlife, and Parks trailer with "State Furbearer Program" on the side, which transported and contained a series of educational display cases containing furbearers of Montana. A member of MTA, and unidentified other individuals, set up the Furbearer display, and hung a sign in the back of the booth which read "Montana Trappers Association, bringing awareness. Vote NO on I-169. I-169 Strips Montanans' Right to Enjoy Montana Public Lands." The Findings of Fact below are entered not only to support the recommendation made herein, but also to provide both state employees and the public with a timeline of events and context of what occurred in 2013 and 2014, and the use of the FWP's Furbearer Trailer and Displays by the MTA.

On July 11, 2014, Trap Free Montana Public Lands (TFMPL) filed a confidential ethics complaint with the Office of the Commissioner of Political Practices (COPP). The

complaint alleged that FWP had violated the code of ethics by allowing MTA to utilize FWP state property to advocate against a ballot issue, Mont. Code Ann. §§ 2-2-101, 2-2-121.

### PROCEDURAL BACKGROUND

On July 15, 2014 the Commissioner provided notice to the parties that the ethics complaint was accepted, and assigned Cause No. COPP-2014-ETH-005. At the same time there was a pending campaign finance complaint with the COPP, which raised some of the same issues.<sup>1</sup> The Commissioner determined that the campaign finance complaint would be processed prior to the ethics proceeding, in order to avoid conflict with the ex parte communication prohibition of Mont. Code Ann. § 2-4-613. On September 2, 2014, FWP responded to TFMPL's complaint requesting dismissal "because it 'does not state a potential violation' of the State Code of Ethics, Mont. Code Ann. § 2-2-131(1)(b)".

On June 9, 2016, the Commissioner issued an Acceptance of Complaint and Notice of Appointment of Hearings Examiner, therein denying FWP's Motion to Dismiss. The Commissioner determined that the complaint alleged a potential violation of the Code of Ethics, and directed the parties and Hearings Examiner to make a determination of the following facts and issues:

- A) Whether a Montana Fish Wildlife and Parks public employee or officer knew, or reasonably should have known that Jason Maxwell was a vice president of the Montana Trappers Association, a group who was actively advocating against passage of ballot initiatives I-167 and I-169 in 2013 and 2014.
- B) Whether Montana Fish Wildlife and Parks public employee or officer knew or reasonably should have known that providing temporary possession of state equipment to a private individual or group could lead to use of state equipment for advocacy purposes, Mont. Code Ann § 2-2-121(3).
- C) Whether a Montana Fish Wildlife and Parks public employee or officer took appropriate steps to prevent the use of "public time, facilities, equipment, supplies, personnel or funds" for ballot issue advocacy purposes, Mont. Code

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<sup>1</sup> *Trap Free (KC York) and Christopher Justice v. Montana Trappers Association and Montanans for Effective Wildlife Management*, COPP-2014-CFP-023. Filed May 22, 2014, sufficiency decision issued September 17, 2015.

Ann. § 2-2-121(3).

The Commissioner advanced the complaint to the informal contested case proceeding pursuant to Mont. Code Ann. § 2-2-136(1)(c), and appointed the undersigned as Hearings Examiner.

The parties were provided with an opportunity to conduct discovery, to file dispositive motions, and to present written and oral testimony on the record. On Friday, October 21, 2016, a one day ethics case hearing was held in Helena. Also on October 21, the parties were ordered to provide additional briefing on a legal issue regarding harmonizing the provisions of Mont. Code Ann. §§ 87-1-204, 2-2-121, and 13-35-226(4), *Montana Shooting Sports Assoc. Inc. v. Mont. Dept. of Fish Wildlife and Parks*, 2008 MT 190, 344 Mont. 1. 185 P.3d 1003. On October 28, 2016 both parties filed an additional legal brief responding to the Order.

The undersigned is submitting the following proposed Findings of Fact and Conclusions of Law for the Commissioner's consideration. The matter is submitted for the Commissioner's final decision pursuant to Mont. Code Ann. § 2-4-623(a)<sup>2</sup>.

### **JURISDICTION AND AUTHORITY**

The Commissioner of Political Practices has jurisdiction to hear and decide complaints filed under Montana's Code of Ethics against state officer, legislators, state employees and county attorneys, Mont. Code Ann. § 2-2-136. Unless a complaint is dismissed as frivolous, or for failing to state a claim of a potential violation of the code, the Commissioner "shall hold an informal contested case hearing", Mont. Code Ann. § 2-2-136(1)(c). The decision that the undersigned and the Commissioner will is "based upon the record established before the commissioner", *id.*

### **PARTIES CONTENTIONS**

FWP contends that the correct legal standard to apply to the facts in this matter is "[w]hether an FWP employee 'use(d) public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office...' as prohibited by Mont. Code Ann. § 2-2-121(3)". TFMPL does not agree with FWP's statement of the legal issue. Instead, TFMPL adopted and

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<sup>2</sup> The Commissioner, upon issuance of these proposed findings of fact and conclusions of law, now has 90 days within which to make a final determination, accepting, rejecting or modifying the Hearings Examiner's proposal, Mont. Code Ann. § 2-4-623(1)(a).

contends that the Commissioner's statement of the issues for determination cited on page 2, hereinabove. FWP does not agree with TFMPL's characterization of the issues based on their interpretation of the statute.

### **FINDINGS OF FACT**

The parties agreed and stipulated to the following facts prior to the informal contested case proceeding, and therefore there was no proof required to be presented by the parties in order for the following facts to be entered into the Commissioner's record at the hearing:

Finding of Fact No. 1: In 2014, Jason Maxwell served as vice-president, west, of the Montana Trappers Association (MTA).

Finding of Fact No. 2: Montana Fish Wildlife and Parks (FWP) knew the MTA was actively advocating against ballot initiatives.

Finding of Fact No. 3: The FWP trailer and fur bearer displays (FWP Equipment) had been used in the past by MTA as referenced in the COPP investigation report.

Finding of Fact No. 4: FWP did not keep records of the use of the FWP trailer and fur bearer displays.

Finding of Fact No. 5: On more than one occasion in 2014, the MTA used the FWP equipment for political advocacy.

Finding of Fact No. 6: The Montana P.L.U.S. event for May 31, 2014, was marketed to oppose I-169.

Finding of Fact No. 7: The MTA used the FWP equipment to oppose I-169 at the Montana PLUS May 31, 2014 event in Missoula.

Finding of Fact No. 8: On June 14, 2014, Jason Maxwell drove a pickup truck to the Hamilton Farmer's market. The truck was pulling a trailer labeled as "Montana Fish, Wildlife and Parks, (FWP) State Furbearer Program" with accompanying logo.

Finding of Fact No. 9: Jason Maxwell, and a few other people unloaded and rolled display cases containing furbearer animals from the FWP trailer, with the label and logo visible, over to the adjacent canopied booth.

Finding of Fact No. 10: At the Hamilton Farmer's market booth, with the furbearer displays, the MTA hung their banner sign, with the wording "Vote No on I-169".

Finding of Fact No. 11: The truck and FWP marked trailer were then parked on the East side of the park, between highway 93 and 2<sup>nd</sup> street, off Bedford Street, in Hamilton.

Finding of Fact No. 12: The MTA used the FWP equipment at Cabelas in Missoula, on June 15, 2014.

Finding of Fact No. 13: FWP learned of the use of the FWP equipment by the MTA in opposing I-169.

Finding of Fact No. 14: After discovering MTA's advocacy at the Hamilton Farmer's Market FWP contacted MTA President Walrath.

Finding of Fact No. 15: The MTA communicated they had made magnets to cover the FWP wording and insignia on the trailer.

Finding of Fact No. 16: After the June 14, 2014 weekend, FWP drafted a sign out policy for the use of the FWP equipment.

Finding of Fact No. 17: The MTA used the FWP equipment without signing out FWP's equipment sign out form.

Finding of Fact No. 18: In January, 2015, FWP Furbearer Coordinator Brian Giddings indicated in response to COPP investigator's questions that MTA declined to sign the sign out policy for use of the FWP equipment.

In addition to the facts agreed to by the parties before the informal contested case proceeding, the witnesses appeared and provided sworn testimony for the record. TFMPL called Ms. KC York as TFMPL's party representative, Mr. Randy Arnold, Mr. Wes Miles, Mr. Mike Thompson, and Mr. Quentin Kujala as FWP's party representative. FWP called Mr. Quentin Kujala as FWP's party representative, Ms. Rebecca Dockter, Ms. Aimee Hawkaluk (nee. Fausser), and Mr. Ron Aasheim.

The parties stipulated to the entry into the record of 52 TFMPL Exhibits, and 11 FWP Exhibits. There were three additional TFMPL Exhibits which FWP objected to as hearsay, Exhibits 4, 6, and 18. The Hearings Examiner conditionally admitted Exhibits 4, 6 and 18 pursuant to Mont. Code Ann. § 2-4-604(4) which provides "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient in itself to support a finding unless it is admissible over objection in civil actions".<sup>3</sup> Here, the parties stipulated that FWP knew that MTA was actively

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<sup>3</sup> Advice given by another former Hearings Examiner for the Office of the Commissioner of Political Practices in "*Montana Administrative Law Practice: 41 Years After the Enactment of the Montana Administrative Procedure Act*", William Corbett, 73 Mont. L. Rev. 339, 363 (2012).

advocating against ballot issues (FOF 2). TFMPL offered the exhibits in an attempt to illustrate extensive contacts between FWP employees and MTA membership, thereby establishing FWP knowledge from 2013 and 2014 that MTA was actively opposing ballot issues.

Exhibit 4, MTA's November 2013 Report, available publically on their website, and talks about I-167 being qualified to gather signatures and is dated October 11, 2013. Ballot Issue I-167 was qualified for gathering signatures on September 6, 2013 (SOS Website).<sup>4</sup> The November 2013 report also includes some discussion by Mr. Paul Fielder about talking with FWP officials in Helena about the ballot initiative. FWP stipulated to the admission of Exhibits 5, 7 and 11, all of which include reports of Mr. Fielder talking with FWP officials about opposing the ballot initiative, as early as December 5, 2013. Exhibit 4 will therefore only be considered for the purpose of supplementing the evidence already in the record.

Exhibit 6, is MTA's December 2013 Report, dated December 13, 2013. TFMPL called the parties attention to the parts of the report which advertised the upcoming MT PLUS event. FWP stipulated to the admission of Exhibits 17-28 regarding the event. Exhibit 6 will only be considered for the purpose of supplementing the evidence already in the record.

Exhibit 18, MTA's June-July 2014 Report, talks about the upcoming MT PLUS Event, which FWP stipulated to the admission of exhibits regarding the event (Exs. 17-28). FWP further stipulated to admission of the following exhibits about other upcoming events: an "upcoming MTA rendezvous in Lewistown this September 5<sup>th</sup> through 7<sup>th</sup>" (Ex. 45-47), the MTA's "annual Youth Trapper Camp will be held on June 13 through the 15<sup>th</sup> of this year" (Ex. 7), and "our billboard which will be up between Missoula and Lolo from mid-May through mid-June" (Ex. 19, 20). Exhibit 18 will only be considered for the purpose of supplementing the evidence already in the record.

Based on the exhibits in the record, and the testimony provided under oath at the

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<sup>4</sup> Mont. R. Evid. 201(b) and (c). I-167 only returned 2 of the 24,175 total signatures to qualify for the ballot. The later proposed I-169 was approved for signature gathering on February 12, 2014, and was the focus of MTA's opposition efforts in the 2014 election cycle.

informal contested case proceeding, the Hearings Examiner makes the following additional findings of fact:

Finding of Fact 19: FWP, and its Furbearer Coordinator, Mr. Brian Giddings, did not maintain records of MTA's use of the Furbearer trailer or displays during 2013 and 2014. (Testimony of Mr. Kajula).

Finding of Fact 20: The FWP trailer and displays were purchased in May of 1996. FWP provided the COPP with documents dating from 1996 to 2005 of "Year End Reports", State of Montana expense vouchers and re-imbusement claim forms, partially documenting MTA's educational use of the FWP Furbearer trailer and displays through 2005. (Ex. 61).

Finding of Fact 21: Mr. Mike Thompson, a FWP employee based in Missoula, testified that he had picked up the trailer and displays in Helena in September of 2013 from Mr. Giddings and delivered the trailer and displays to Mr. Walrath in Corvallis. Mr. Thompson also testified that he used state time, and public resources, to make the delivery to Mr. Walrath. (Testimony of Mr. Thompson).

Finding of Fact 22: Other than the testimony provided by Mr. Thompson above, none of the officials responsible for the furbearer program were able to state with specificity when MTA obtained the trailer from FWP during 2013 and 2014, when or if the trailer and displays were returned to FWP, nor for what events or purposes the FWP equipment was used by MTA. (Testimony of Mr. Randy Arnold, FWP Regional Supervisor, Region II, Missoula; Mr. Quentin Kujala, FWP Wildlife Bureau Coordinator; Ms. Rebecca Dockter, FWP Chief Legal Counsel; and Mr. Ron Aasheim, FWP Communications/Educator Division Administrator).

Finding of Fact 23: On September 6, 2013, Ballot Issue I-167 was approved for signature gathering by the Montana Secretary of State, and its purpose was to "prohibit trapping of certain animals by private individuals on any public lands

within the State of Montana, (Ms. York Testimony, MT SOS website, Mont. R. Evid. 201(c).)

Finding of Fact 24: In October of 2013, the Montana Trappers Association began publically advocating against ballot issue I-167. (Ex. 1, 2, and 7).

Finding of Fact 25: Part of MTA's efforts against the ballot issue was to form a ballot issue committee called Montanans for Effective Wildlife Management (MEWM), and to encourage their membership to join and support the cause. (Ex. 1, and 2).

Finding of Fact 26: On December 5, 2013, Mr. Fielder reported to FWP officials that MTA would be "fighting anti-trapping initiative" at the Region 1, Citizens Advisory Committee Meeting. (Ex. 5).

Finding of Fact 27: On December 13, 2013, Mr. Toby Walrath, President of the MTA, posted the MTA's January 2014 Report which stated "Beating the ballot initiative will be our greatest victory in 2014". (Ex. 7).

Finding of Fact 28: On February 12, 2014, Ballot Issue I-169 was approved for signature gathering by the Montana Secretary of State, and its purpose was to "prohibit trapping of certain animals by private individuals on any public lands within the State of Montana, (Ms. York Testimony, MT SOS website, Mont. R. Evid. 201(c)).

Finding of Fact 29: By March 5, 2014 MTA had posted an image encouraging people to "Vote NO on I-169. I-169 Strips Montanans' Right to Enjoy Montana Public Lands" on their Facebook page. (Ex. 8).

Finding of Fact 30: On April 16, 2014, Mr. Fielder reported to FWP employees at the Region 1, Citizens Advisory Council meeting, that MTA would be hosting a MT PLUS event in Missoula on May 31<sup>st</sup>. The purpose of the event was to "primarily talk about trapping initiatives". (Ex. 11).



Finding of Fact 31: On May 10, 2014, Mr. Maxwell set up a booth at the Hamilton Farmers Market for Montanans for Effective Wildlife Management and the Montana Trappers Association. There is no evidence in the record that the FWP's Furbearer trailer and display were used at the event. (Ex. 12).

Finding of Fact 32: On May 12, 2014, the FWP Furbearer displays were used in the MTA's booth at the 2014 Youth Conservation and Education Expo at the Teller Wildlife Refuge in Corvallis. (Ex. 13 -15). There is no evidence in the record that the FWP's Furbearer trailer and displays were used for advocacy purposes at the event.

Finding of Fact 33: On May 18, 2014, MTA posted a reminder of the upcoming MT PLUS event to be held in Missoula to their Facebook page. "[J]oin the Montana Trappers Association and several other organizations and individuals in saying NO to I-169". (Ex. 17).

Finding of Fact 34: On May 19, 2014, the MTA posted a photo of their billboard on Highway 93 between Lolo and Missoula to their Facebook page. (Ex. 19-20). The billboard read "Keep Montana's Public Lands Public. Say NO to I-169. Montana PLUS, Public Land Users and Sportsmen. Join Us: Saturday May 31, 8:00 am -6 pm, Missoula County Fairgrounds. Paid for by Montanans for Effective Wildlife Management, Jim Buell, Treasurer, P.O. Box 133, Gilford, MT 59525".

Finding of Fact 35: On May 23, 2014, MTA invited members of the public to "[c]ome say hi to MTA President Toby Walrath and VP West Jason Maxwell tomorrow...at Hamilton's Farmers Market" on their Facebook page. (Ex. 21).

Finding of Fact 36: On May 27, 2014, MTA posted another reminder of the upcoming Montana PLUS event, detailing the costs of admission, prizes and urging "Say NO to I-169". (Ex. 17).

Finding of Fact 37: The MT PLUS event was advertised by the MTA in the following way: "The Montana Trappers Association will be hosting the first MT PLUS event on

May 31, 2014 in an effort to unite all the groups in Montana, who utilize public lands, consume natural resources and who oppose restrictive laws which keep Montanans from using and enjoying the outdoors". (Ex. 23).

Finding of Fact 38: Mr. Thompson testified that initially MTA asked FWP to attend the event and to put a booth up, but once FWP learned it was an event opposing a ballot issue, that Mr. Thompson informed the MTA that FWP would not attend.

Finding of Fact 39: The FWP Furbearer displays were used by MTA to oppose ballot issue I-169 at the MT PLUS event, on May 31, 2014. (Ex. 26, 27).

Finding of Fact 40: Mr. Arnold testified that he did not attend the MT PLUS event in Missoula on May 31, 2014. Mr. Arnold further testified that he did not recall seeing the billboard advertising the MT PLUS event. Mr. Thompson also testified that he did not attend the MT PLUS event.

Finding of Fact 41: On June 3, 2014, the MTA's requested an individual go relieve a volunteer handing out information at a "voting booths" in Corvallis on their Facebook page. (Ex. 51). MTA also had volunteers posted at the Lolo School polls (Ex. 50). There is no evidence in the record that the FWP's Furbearer trailer and displays were used for advocacy purposes at either of the events.

Finding of Fact 42: On Saturday, June 14, 2014, the FWP Furbearer displays were used by Mr. Maxwell, Vice President of MTA West, to oppose ballot initiative I-169 at the Hamilton Farmer's Market. (Ex. 29-35, 62; testimony of Mr. Wes Miles).

Finding of Fact 43: On Sunday, June 15, 2014, the FWP Furbearer displays were used by the MTA at an event held at Cabelas Outpost in Missoula. (Ex. 36).

Finding of Fact 44: On June 16 or 17, 2014, Mr. Giddings received complaints from members of the public regarding MTA's use of the FWP equipment to advocate

against the I-169 ballot issue. (Testimony of Mr. Kujala; Mr. Arnold, Mr. Thompson, Ms. Dockter, Mr. Aasheim).

Finding of Fact 45: On Tuesday, June 17, 2014, Mr. Giddings informed Ms. Hawkaluk (nee. Fausser), FWP Agency Legal Counsel, that members of the public were contacting him regarding MTA's use of the FWP Furbearer trailer. (Ex. 54). Ms. Hawkaluk advised Mr. Gidings "that he, or someone within the Department, should call the Montana Trappers Association to reinforce that all their activities related to the ballot initiative should be kept completely separate from the use of our trailer and other FWP materials". (Ex. 54, 69).

Finding of Fact 46: Also on June 17, 2014, Mr. Aasheim informed Ms. Dockter, FWP Chief Legal Counsel, "that the MT Trapper Association...were criticized for using the FWP Furbearer Program trailer and pelts for the purpose of opposing I-169....We discussed and he understood that although there were no FWP 'public officers or employees' involved, the [MTA] should not be allowed to continue the use of the equipment in any way connected with their initiative advocacy. [Mr. Aasheim] understood this and planned to contact Toby Walrath, [MTA] President, again to discuss this. (Ex. 55, 70; testimony of Ms. Dockter).

Finding of Fact 47: On June 17, 2014, after speaking with Ms. Dockter, Mr. Aasheim sent Mr. Walrath an email stating "Hi Toby, I'll give you a call tomorrow" with a forwarded email attached that was from Ms. Dockter and to Mr. Aasheim regarding "initiative law language". (Ex. 67; testimony of Mr. Aasheim).

Finding of Fact 48: After receiving the email, on June 17, 2014, Mr. Walrath replied to Mr. Aasheim by email stating: "We will certainly not use the furbearer display anywhere near a MEWM sign again – this was not the intention of the use. The furbearer display was part of our education and outreach for MTA – just as we have done countless times. We plan to continue attending the farmers market with MTA – non – political outreach in coming weeks. Although entirely separate, it was a poor decision on the MTAs part to combine the two entities (MEWM and MTA) at

one location near equipment bearings the FWP insignia. This will not happen again." (Ex. 67; testimony of Mr. Aasheim).

Finding of Fact 49: Two days later, on Thursday, June 19, 2014, Ms. Hawkaluk discovered an June 18 online comment from Mr. Maxwell of the MTA, which "indicated that 'we have made magnets to cover the FWP logo with our logo as to clear up any future misunderstandings when in our possession'" (Ex. 54, 69). Ms. Hawkaluk brought the matter to her supervisor's attention, and informed Mr. Giddings "that there needed to be follow up with the MTA to emphasize that, regardless of the MTA's efforts to cover up the state logo, FWP property absolutely may not be used in connection with advocacy for or against I-169".

Finding of Fact 50: Also on June 19, 2014, Ms. Dockter learned from Ms. Hawkaluk that MTA had "developed magnets to cover the FWP logo on the trailer. I contacted Ron Aasheim again and informed him that he needed to inform the [MTA] President again that covering up the State logo is not acceptable. Mr. Aasheim committed to making the call again. I understood from Ron Aasheim that the [MTA] would cease use of the trailer and equipment and that the issue had been resolved". (Ex. 55, 70, Ms. Dockter testimony).

Finding of Fact 51: Although concerned about the future use of the FWP equipment by the MTA, no FWP employee recalls asking or requiring that the MTA return the FWP Furbearer trailer or display to FWP following MTA's use of state equipment to oppose a ballot issue at the Hamilton Farmer's Market. (Testimony of Mr. Kujala, Mr. Arnold, Mr. Thompson, Ms. Dockter, Mr. Aasheim).

Finding of Fact 52: On June 26, 2014, Mr. Aasheim responded to Mr. Koeppen, a member of the public's, inquiry regarding MTA's use of the FWP's furbearer trailer and display "at recent events", stating that FWP did not authorize the use, that they immediately contacted Mr. Walrath, and "asked that they not display the trailer in a way that it made it appear FWP was a part of their efforts regarding I-169 which we

were not. Toby immediately agreed to our request and gave his membership that direction." (Ex. 39, 64).

Finding of Fact 53: On July 4, 2014, the MT Cowgirl Blog posted a blog entry entitled "Despicable". (Ex. 63, 65).

Finding of Fact 54: On July 7, 2014 Mr. Aasheim responded to an email inquiry from the MT Cowgirl "seeking clarification of FWP position on trappers using FWP trailer to campaign against a ballot measure" (Ex. 66). This response was similar to Mr. Koeppe received on June 26, 2014, but contained the additional information: "By way of background the educational furbearer displays were purchased with federal dollars that were matched by in kind contributions from the Montana Trappers Association in the mid 1990s. Since then we have made the displays and associated trailer available for a number of events over the years including, in many cases, educational events of the Montana Trappers Association".

Finding of Fact 55: On July 7, 2014, the MT Cowgirl Blog posted a blog entry entitled "FWP: Trappers did not have permission to use state equipment to oppose ballot initiative". (Ex. 66).

Finding of Fact 56: On July 3, 2014 Ms. Dockter memorialized her actions regarding the FWP Furbearer trailer and displays in a memo. (Ex. 55, 70; Ms. Dockter testimony). In the memo she stated "There were no further incidents that would warrant further action... We also developed a form for users of our equipment to acknowledge that they will not use our equipment in any way related to initiative work. And we will develop a policy indicating how we plan to proceed in the future."

Finding of Fact 57: Also on July 3, 2014, Ms. Hawkaluk memorialized her actions regarding the FWP Furbearer trailer and displays in a memo. (Ex. 54, 69; Ms. Dockter testimony).

Finding of Fact 58: "Immediately" after the incident, and by August of 2014, FWP developed a "FWP Property or Equipment Use Agreement and Acknowledgment of Liability and Risk" to govern the use of the furbearer trailer and display in the future. It states "I agree not to use any FWP property to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or influence of a ballot initiative". (Ex. 44, 68, 42, Testimony of Mr. Kujala, Ms. Dockter, Ms. Hawkaluk, Mr. Aasheim).

Finding of Fact 59: On August 23, 2014, the MTA used the FWP's Furbearer displays at the Elk Extravaganza at the Bitterroot Valley Archery Store in Lolo. (Ex. 43).

Finding of Fact 60: On September 2, 2014, former COPP investigator Vanessa Sanddal received evidence from Mr. Giddings that the FWP trailer and displays were titled to the State of Montana. (Ex. 44, 60, 61).

Finding of Fact 61: In September of 2014, MTA used the FWP Furbearer displays at their annual Rendezvous in Lewistown. (Ex. 45-47, testimony of Mr. Kujala).

Finding of Fact 62: In the last few weeks of 2014, MTA returned the FWP Furbearer trailer and display to Helena. (Ex. 48, 60).

Finding of Fact 63: As of January 9, 2015, Mr. Giddings informed the COPP and his in-house counsel, Mr. Zipfel, that "MTA has declined to sign off on the equipment use agreement that we had recently written up". (Ex. 48, 60).

Finding of Fact 64: The MTA has continued to refuse to sign the equipment use agreement, and the Furbearer trailer and displays have been used solely by FWP since January of 2015. (Testimony of Mr. Kujala).

Finding of Fact 65: Mr. Arnold testified that he was aware that it is a violation of the code of ethics for an employee to use state property to promote or oppose a candidate or a ballot issue. Mr. Arnold also testified that when the state property use

is "near or adjacent" someone promoting or opposing a candidate or ballot issue that this issue becomes more gray. Mr. Arnold also testified to receiving regular updates during campaign season and prior to legislative sessions about state employee's duties regarding the code of ethics.

Finding of Fact 66: Mr. Thompson testified that he became aware of MTA's use of FWP equipment at the Hamilton Farmer's market on Monday or Tuesday following the event. Mr. Thompson testified that the use "created at least a perception problem". Mr. Thompson also testified about his awareness of Montanan's perception of state employees, and in particular FWP employees. He stated that he views himself as a steward of the state's resources, that he strives to conduct himself in a professional and friendly manner, and that it is a lifestyle to lead a life of public service.

Finding of Fact 67: Mr. Kujala testified that FWP employees received regular reminders of the code of ethics. He testified that there is a clear line of how employees are to conduct themselves, which can become fuzzy sometimes in circumstances which are challenging. Mr. Kujala testified that FWP staff strives to be candid, clear and objective in their information gathering from the community when coming to a FWP policy determination.

Finding of Fact 68: Mr. Kujala testified that the sign out policy for use of state property was made known across FWP following the incident at the Hamilton Farmers Market. Mr. Kujala did not know if the display cases had a label on them identifying if they were property of the state, but he stated he would not be surprised if there was information on the displays which would bear the FWP logo. Mr. Kujala also testified that he was not aware of when MTA received the Furbearer trailer and displays, or for what events the MTA used the FWP equipment during 2014.

Finding of Fact 69: Mr. Kujala testified that the use of state agency equipment by an outside group to support or oppose an issue is a gray area. Mr. Kujala testified that use of state materials is prohibited by the code of ethics, and that state materials

were used at the Hamilton Farmers Market. Mr. Kujala testified that FWP's policy that was developed in August 2014 to address the use of state property by outside parties is to reference the statute prohibiting the use, as in the FWP's sign out agreement. Mr. Kujala testified that it is current FWP policy that it is not appropriate for FWP staff or supplies to be provided to a group supporting or opposing a ballot issue during the time that the group is involved in the ballot issue.

Finding of Fact 70: Ms. Dockter testified that she advises FWP employees about the requirements of the code of ethics, and that she has done trainings for FWP employees on ethics. Ms. Dockter testified that it was her general impression that FWP employees understand and follow the law, and seek assistance when an issue is raised. Ms. Dockter testified that FWP did not want the appearance to the public to be that state equipment was being used for advocacy purposes which were not authorized by FWP, and distinguished FWP lobbying activities.

Finding of Fact 71: Mr. Aasheim testified that the trailer and displays were purchased for educational purposes in the 90s, and in the prior 15-20 years he was not aware of them being used for political purposes by the MTA. Mr. Aasheim testified that he received notice of the incident through an email from Mr. Giddings. Mr. Aasheim testified that he spoke with legal, and followed up with Mr. Walrath of the MTA. Mr. Aasheim stated that he followed up by ensuring there was a process in place for further use of the trailer. Mr. Aasheim also testified that he was not sure when the trailer and displays were returned to the FWP, but acknowledged use of the FWP equipment by the MTA in August and September of 2014.

## **DISCUSSION**

The Montana Legislature adopted the Code of Ethics for Montana state and local officers and employees and legislators "prohibiting conflict between public duty and private interest", Mont. Constitution, Article XIII, §4. "The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officers, legislators, and public employees....[who] shall carry out the individual's duties for the benefit of the people of the state", Mont. Code Ann. § 2-2-102(1). "A public officer ... or public employee whose conduct departs from the person's



public duty is liable to the people of the state and is subject to the penalties provided ...for abuse of the public's trust", *id.* (2).

### **LEGAL STANDARD**

"We interpret a statute first by looking to its plain language. We construe a statute by reading and interpreting the statute as a whole 'without isolating specific terms from the context in which they are used by the Legislature'....Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it. We must harmonize statutes relating to the same subject, as much as possible, giving effect to each."

*Mont. Sports Shooting Asscn., Inc. (MSSA) v. State of Montana*, 2008 MT 190, ¶11, 344 Mont. 1, 185 P.3d 1003. (internal citations omitted).

### **DISCUSSION OF STATUTES**

FWP argues that harmonizing the statutes is not necessary because it was not provided with notice of the need to harmonize the statutes. FWP first raised an objection to the Complaint filed in this matter, stating that under the statute it was not a FWP employee who used the equipment, and therefore the complaint should be dismissed on September 2, 2014. The Commissioner overruled that objection by issuing his Acceptance of Complaint and Appointment of Hearings Examiner on June 9, 2016.

The Hearings Examiner does not have the ability to change the Commissioner's standard, but does have the ability to recommend a statutory interpretation and legal determination to the Commissioner. As such, the Notice of Hearing and Scheduling Order provided ample opportunity for FWP to present its statutory arguments on why the Commissioner is incorrect. Prior to and at the hearing FWP presented only argument reading the statute in isolation, and without citation to authority supporting their interpretation. By requesting and receiving the FWP's legal argument, the Hearings Examiner has moved to preserve for the record FWP's basis for an objection to the Commissioner's "characterization" of the standard. FWP's objection to harmonizing statutory language based on "fair notice" is denied.

#### **1. Harmonizing Statutes On The Same Subject**

Although amended several times, the Legislature in 1921 passed a law regulating the political activity of FWP employees which provides:

While retaining the right to vote as the employee pleases and to express opinions on all political questions, an employee of the department may not use the

employee's official authority or influence for the purpose of interfering with an election or affecting the results of an election or for the purpose of coercing or influencing the political actions of any person or body.  
Mont. Code Ann. § 87-1-204.

The Montana Supreme Court has determined that the "use" in the second portion<sup>5</sup> of the FWP political activity statute, a prohibition on "political action" is applied "to FWP employees only in the partisan political sense", *MSSA v. State*, at ¶ 30. The "use" we have here, is a use of FWP equipment to support a ballot issue, and ballot issues are considered non-partisan in nature, *id.* at ¶28, *citing to U.S. Civil Service Com'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 575-76, 93 S.Ct. 2880. Therefore, second half of the statute does not apply in to the determination in this matter.

The first half of the FWP political activity statute states that no FWP employee "may use his official authority or influence for the purpose of interfering with an election or affecting the results there of...", Mont. Code Ann. § 87-1-204. There is no specific list of acts of official authority or influence which constitute a "use" by a FWP employee in the statute.

When arguing the second half of the statute to the Supreme Court, FWP forwarded the position that "the Legislature intended §87-1-204, MCA, to cover only political elections, like the general prohibition on public employees' political activity under §2-2-121, MCA, and §13-35-226, MCA", *MSSA v. State*, at ¶15. Further, FWP argued that the prohibitions in the statute do not create a stricter standard for FWP employees than it does for any other state employee, *id.* at ¶16, as the FWP also argues here. In making those arguments to the Supreme Court, FWP relied upon the later enacted and itemized provisions of actions or "uses" which public employees were allowed or not allowed to perform under Mont. Code Ann. § 2-2-121 in order to support their interpretation of the meaning of for lobbying, *MSSA v. State*, 2007 Mt. S. Ct. Briefs 311, pp. 7-11 (Aug. 17, 2007).

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<sup>5</sup> "...no employee of [FWP] may use his official authority or influence...for the purpose of coercing or influencing the political actions of any person or body", Mont. Code Ann. § 87-1-204.

Montana law also provides:

[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Mont. Code Ann. § 1-2-101.

In applying this rule of statutory construction, "more specific statutes prevail over general provisions of law", *Yellowstone Fed. Credit Union v. Daniels*, 2008 MT 111, ¶ 18, 342 Mont. 451, 181 P.3d 595 (internal citation omitted). Further, "[w]e must presume in construing these statutes that the Legislature intended to make some change in existing law by passing it", *MSSA v. State*, 2008 MT 190, ¶15. "We must presume that the Legislature would not pass useless or meaningless legislation", *id.* (internal citations omitted).

Examining the later passed legislation, which has also been amended, two statutes that deal with political activity of employees were both codified from the Revised Codes of Montana 1947 in 1977. Both statutes give effect to the general prohibition in the FWP political activity statute by providing a list of prohibited and allowed "official authority" actions, Mont Code Ann. § 87-1-204.

The first specific statute remains essentially unchanged in its prohibitions and states:

A public employee may not solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue while on the job or at the place of employment. However, subject to 2-2-121, this section does not restrict the right of a public employee to perform activities properly incidental to another activity required or authorized by law or to express personal political views.

Mont. Code Ann. § 13-35-226(4).

The violation of this statute is a campaign practice violation, and is liable in a civil action under the campaign finance laws, *id.* (5). The statute provides specific examples of official actions that a public employee may not take (soliciting support or opposition while on the job or at work) and those actions which a public employee may lawfully

take (properly incidental actions and expression of personal political views). The statute is also "subject" to the provisions of Mont. Code Ann. § 2-2-121.

The second specific statute, and raised here in the complaint which was filed with the COPP provides "rules of conduct for public officers and public employees" including:

(3)(a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

- (i) Authorized by law; or
- (ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(3)(b) as used in subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to the solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for office. With respect to ballot issues, properly incidental activities are restricted to:

- (i) the activities of a public officer, the public officer's staff, or legislative staff related to determining the impact of passage or failure of a ballot issue on state or local government operations..."

Mont. Code Ann. § 2-2-121(3)(a) and (b).

The parties agreed that an individual FWP employee had a right to express their own personal political view, Mont. Code Ann. § 2-2-121(3)(c), 51 Op. Att'y Gen. No. 1. The parties further agreed that FWP's "public time, facilities, equipment, supplies, personnel, or funds" could not be used by any FWP employee to support or oppose candidates, a slate of candidates, or committees who support the same, Mont. Code Ann. § 2-2-121(3)(b). The only FWP employee ballot issue activity that is exempt from an ethics statute violation is when the FWP is called upon to determine the impact of a ballot issue on FWP's operations, Mont. Code Ann. § 2-2-121(3)(b)(i). The parties agreed that any use of public time, facilities, etc. used by FWP in order to determine the impact of I-167 or I-169 on FWP's operations were properly incidental activities of the state.

Any other FWP employee activity to support or oppose a ballot issue "us[ing] public time, facilities, equipment, supplies, personnel, or funds" is strictly prohibited as not properly incidental to nor authorized by law, Mont. Code Ann. § 2-2-121(3)(a). FWP argues that since it was not a state employee or officer "using" the Furbearer equipment

to solicit support for the ballot issue, that there cannot be a violation of the code of ethics. TFMPL takes the position that someone at the FWP had to provide MTA with access to use be allowed to "use" the Furbearer equipment, and that the access provided to MTA was not properly supervised, nor accounted for. An examination of the code of ethics interpretation of "use" of public property by a state employee and a member of the public is therefore in order.

## **2. "Use"**

In 1995 the Montana Legislature changed the code of ethics to include regulation of use of "public time, facilities, equipment, supplies, personnel, or funds" by local government officers and employees for private business purposes, Mont. Code Ann. §2-2-121(2)(a).<sup>6</sup> The change in the law triggered a request for an opinion by the Attorney General, as to how part-time county attorneys use of county "facilities, equipment, and supplies..." for their part-time private business purposes should be reconciled with the new requirements, 46 Op. Att'y Gen. No 10, Dec. 1, 1995, p. 4. Attorney General Mazurek also noted that generally the shared public/private use of county property "is not documented at all, but has proceeded as a matter of custom developed over many years of experience", *id.*

The Attorney General found that a part-time county attorney could lawfully "use" the resources of the county for his or her private business purposes under a contractual agreement to provide for reimbursement of the private use to the county. "[U]nder proper conditions arrangements can be entered into between the part-time county attorneys and the counties which do not violate Mont. Code Ann. § 2-2-121(2)(a)", 46 Op. Att'y Gen. No. 10, p. 5. This is a specific example of how "use" is interpreted as stated in the code of ethics, and directly interprets its meaning in the provisions of Mont. Code Ann. § 2-2-121. When a private individual uses state or county property, the code of ethics provides that the "use" must be done under contract with the private party while mindful of the prohibitions of "use" on government employees.

An Attorney General Opinion has the authority of law, "unless overruled by a state district court or the supreme court", Mont. Code Ann. § 2-15-501(7). Since 1995, the AG's opinion has held that the term "use" in the Mont. Code Ann. 2-2-121 includes a

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<sup>6</sup> Previously, the code only applied the restriction to state officers and employees, not to local elected officers, i.e. county attorneys. 46 Op. Att'y Gen. No. 10, p. 4.

public official or employee duty to provide for contractual arrangements to prevent a conflict between private and public use of public resources. "Where the Legislature acquiesces in long-standing agency interpretation of a statute and takes no action to inform that interpretation, the court will presume that the Department has properly interpreted the law." *Lohmier v. State*, 2008 MT 307, ¶28, 346 Mont. 23, 192 P.3d 1137, quoting *Baitis v. Department of Revenue of State*, 2004 MT 17, ¶ 24, 319 Mont. 292, 83 P.3d 1278. The Legislature is presumed to know of the Attorney General's 1995 opinion on "use", took no subsequent action to clarify or modify the interpretation of the word "use" in Mont. Code Ann. § 2-2-121(2) or (3).

A part-time county attorney is prohibited from using public resources for their private business purposes, Mont. Code Ann. § 2-2-121(2). A private individual, party or group is also prohibited from using "public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to...a ballot issue", Mont. Code Ann. § 2-2-121(3)(a). Any use of public resources must be memorialized in a contractual agreement with the state agency responsible for the state property, and the agreement must set out the allowed uses by the third party of state property.<sup>7</sup> This interpretation of "use" harmonizes the later enacted specific "uses" in Mont. Code Ann. § 2-2-121 with the earlier enacted prohibited "use" of a FWP employee's official authority or influence through providing private access to public property in Mont. Code Ann. § 87-1-204.

### ANALYSIS

"It is the purpose of this part to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana", Mont. Code Ann. § 2-2-101. The purpose of the code of ethics states quite simply the purpose of the entire act. We as state employees are charged with conducting our professional duties for the benefit of all Montanans, and to be mindful of the public trust invested in our duties as we carry them out, Mont. Code Ann. § 2-2-103(1). Without regular discussion of our obligation from the ten thousand foot vantage point of the whole code of ethics, why it exists, and how to deal with the issues that arise, it is easy to

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<sup>7</sup> The remedies to the state agency should a member of the public violate the agreement could include: unsworn falsification to authorities, Mont. Code Ann. § 45-7-203, false swearing, Mont. Code Ann. § 45-7-202, or tampering with public records or information, Mont. Code Ann. § 45-7-208.

slip into complacency of familiarity on what our public duty requires. That is precisely what occurred here.<sup>8</sup>

FWP is a state agency, created in 1901, and charged with managing and conserving the fish, wildlife and state park resources of Montana.<sup>9</sup> FWP interacts extensively, and on a daily basis with members of the public. FWP takes the opinions and suggestions of the public and MTA members into consideration when making governmental policy decisions on proposed legislation and regulation. FWP views the public as "stakeholders" and "interested parties" who have expertise that individual FWP employees might not have themselves, and therefore an invaluable resource to the department. FWP regularly reaches out to members of the public, holding roundtables to discuss policy and priorities of the agency. As readily admitted by the FWP employees at the hearing, there are times in interacting with the public that the employees are called upon to prioritize their public duty to Montanans as a whole, and sometimes that might spark conflict with members of the public who disagree with the public determination. (FOF 65-71).

There is a long standing tradition of trust between the members of the MTA and the public officers and employees of FWP. Since the FWP Furbearer trailer and displays were originally obtained by the FWP in 1996, MTA has used the trailer and displays for educational purposes without conflicting with the obligations of state employees under code of ethics (FOF 20, 71). However, there was no agreement in place which the MTA was required to sign by the FWP in order to use the state property prior to July or August of 2014 (56, 58, and 63). MTA's previous uses without incident led to the complacency in FWP's duty to regulate the private use of public property. In the spring and summer of 2014, that trust was broken by members of the MTA, through repeated use of state property to oppose a ballot issue (FOF 5-11, 39, 42-43).

The records maintained by the agency of the use of the Furbearer trailer and displays were spotty at best, and when requested by the COPP, FWP was only able to

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<sup>8</sup> "There is hope in honest error, none in the icy perfection of the mere stylist", J.D. Sedding, English Architect. This aphorism later became a personal motto for Charles Rennie Mackintosh, a Scottish Architect. The undersigned has also adopted the quote as a personal motto.

<sup>9</sup> Montana Fish, Wildlife & Parks, Vision and Guide, 2016-2026  
<http://fwp.mt.gov/fwpDoc.jsp?id=76036>

produce 43 documents covering 18 years of use, (Ex. 61). None of the documents produced was a contract between the FWP and MTA regulating the private use of the public property. In fact, only one FWP employee was able to provide any detail as to when the MTA received the trailer to FWP during 2013 or 2014 (FOF 22, 51). Mr. Thompson testified that in September of 2013 that he delivered the trailer and displays from the Helena FWP parking lot to Mr. Walrath<sup>10</sup> in Corvallis (FOF 21). The Furbearer trailer and displays were later reported by Mr. Giddings to be back in the possession of the FWP by January of 2015 (FOF 62-64). Between September 2013 and late 2014, no one in the FWP can account for the whereabouts, specific use of or possession of the FWP trailer and displays.<sup>11</sup>

As early as December 5, 2013, FWP employees were informed at a public round table session that MTA had the intention of "fighting the anti-trapping initiative" (FOF 26, 30). Subsequently, FWP employees were invited to participate in the MT PLUS event to be held in Missoula in May of 2014; but when the FWP learned that the event's purpose was to oppose the I-169 ballot initiative, the FWP employees stated they could not attend (FOF 30, 38, 40). At no point did any FWP employee testify that they attempted to ensure that MTA would not use the Furbearer trailer or display at the MT PLUS event.

On Saturday June 14, 2014, Mr. Maxwell of the MTA used the FWP Furbearer trailer and displays to actively oppose a ballot issue (FOF 42). On Sunday June 15, 2014, the MTA set up the Furbearer displays at Cabelas in Missoula, and located a table with information opposing the ballot issue right next to the displays (FOF 43, Ex. 36). By the following Monday or Tuesday, Mr. Giddings started receiving complaints from members of the public about MTA's use of the state's Furbearer trailer and displays over the weekend.

Mr. Giddings sought advice from Mr. Kujala and Mr. Aasheim, all of whom sought advice from the legal department (Ms. Dockter, Ms. Hawkaluk and Mr. Zipfel). The advice received was to draft a new sign out policy noting that the state property

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<sup>10</sup> President of Montana Trappers Association.

<sup>11</sup> Other than the uses made by MTA which are in the findings of fact above (May 10 Hamilton Farmers Market, FOF 31; Youth Conservation and Education Expo, FOF 32; MT PLUS Event, FOF 6-7, 33-34, 36-40; June 14 Hamilton Farmer's Market, FOF 8-11, 42; Cabelas event, FOF 12, 43; Elk Extravaganza, FOF 59; MTA Rendezvous, FOF 61).



could not be used for political purposes and to tell MTA not to use the trailer for political purposes (FOF 44-48). No FWP employee was able to identify when MTA was requested to sign the agreement, only that by January of 2015 that MTA had refused to sign the agreement and returned the state property (FOF 63-64).

Even upon receipt of notification that MTA, a day after being told not to use the state equipment and promising not to, still intended use of the Furbearer trailer and displays for political purposes, by manufacturing a magnet to cover up the FWP logo, FWP did not seek the return of the state equipment (FOF 15, 49-50). Members of the public were asking for information about MTA's use of state property, or making internet posts, and the Commissioner's office was seeking information about the use due to a campaign practice complaint (FOF 13, 18, 44, 45-48, 51-55, 60). None of this increased public scrutiny led to a FWP official requesting that MTA return the trailer and displays until a resolution could be reached. Instead, FWP was twice reassured by the word of Mr. Walrath that the issue was resolved (FOF 14, 50). As a result, the MTA continued in possession of the Furbearer trailer and displays, without interference from FWP, throughout the remainder of 2014 (FOF 17-18, 44, 59, 61-64).

It is important to note that FWP naturally came up with the right solution to the issue by drafting an agreement which MTA would be required to sign prior to using state property in mid-June to early July of 2014 (FOF 56-58). The problem is that FWP did not implement the solution. The appropriate action would have been to request the immediate return of the state property, draft the private use agreement, and then allow MTA to use the state property for educational purposes benefitting the people of Montana once the agreement had been signed.

### **CONCLUSION**

The Code of Ethics should be read as a whole, and not in isolation. Only a state employee or officer can take an action which would provide a private party with access to state property.<sup>12</sup> If an employee of a state agency were to allow a candidate or committee to "use" a state photocopy machine to copy campaign material for the campaign's use, it should not and could not prevent an ethics violation from being found against that employee. That would be an absurd result, where a state employee could

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<sup>12</sup> The proverbial "Keys to the Kingdom".

immunize themselves from the consequences of the code, by simply allowing a private individual or group access to use the state owned photocopier, *MSSA v. State*, 2008 MT 190, ¶11. On the flip side of that coin, "use" of the capitol building or other public property by the public to redress their grievances to the government is clearly a private use of a public space that is authorized by law, Mont. Code Ann. § 2-2-121(3)(a)(i).

Public officers and employees have a duty to take reasonable steps to prevent the private use of public resources for political advocacy purposes as provided by Mont. Code Ann. § 2-2-136(3). FWP failed to have in place an agreement regulating the private use of public property and ensuring that private use does not conflict with the Code of Ethics. Through this policy and regulation omission FWP employees and officers allowed the private use of public property to advocate against a ballot initiative, in violation of their public duty to Montanans under the Code of Ethics, Mont. Code Ann. § 2-2-121(3)(a).

#### **CONCLUSIONS OF LAW**

1. Public officers and employees have a duty to take reasonable steps to prevent the private use of public time, property and resources for political advocacy purposes as provided by Mont. Code Ann. § 2-2-136(3).
2. State agencies must provide and maintain a written current contractual agreement and policy regulating the private use of state property in order to comply with the Code of Ethics, Mont. Code Ann. § 2-2-136.
3. FWP knew that Jason Maxwell was a vice president of Montana Trapper's Association, a group actively advocating against passage of ballot initiatives I-167 and I-169 in 2013 and 2014.
4. FWP employees or officers knew or reasonably should have known that providing temporary possession of state equipment to a private individual or group could lead to use of state equipment for advocacy purposes.
5. FWP employees or officers did not take appropriate steps to prevent the private use of "public time, facilities, equipment, supplies, personnel or funds" for ballot issue advocacy purposes, Mont. Code Ann. § 2-2-121(3).

#### **RECOMMENDED ORDER**

1. FWP is responsible for three separate violations of the code of ethics, for not taking appropriate steps or having policy in place to prevent MTA's private use of

state property to oppose a ballot issue at the May 31 MT PLUS Event, the June 14 Hamilton Farmer's Market, and the June 15 Cabelas Event, pursuant to Mont. Code Ann. § 2-2-121(3)(a).

2. The Hearings Examiner recommends that the Commissioner impose an administrative penalty on Montana Fish, Wildlife and Parks of \$500 for each separate violation, totaling \$1,500, Mont. Code Ann. § 2-2-136(2)(a). To the extent legally necessary, the Hearings Examiner recommends the findings are specifically attributable to the policy actions and omissions of Jeff Hagener, FWP Director; Ron Aasheim, FWP Communications and Education Division Administrator; and Rebecca Dockter, FWP Chief Legal Counsel. The undersigned recommends that Montana Fish, Wildlife and Parks pay the civil fine in this matter.
3. FWP as an agency is responsible for the failure to properly regulate private access to state property. The Hearings Examiner recommends that no single employee or group of employees should be subject to disciplinary action, and does not recommend any additional disciplinary action be taken by FWP, Mont. Code Ann. § 2-2-136(2)(c). To the extent legally necessary, the Hearings Examiner recommends the findings are specifically attributable to the policy actions and omissions of Jeff Hagener, FWP Director; Ron Aasheim, FWP Communications and Education Division Administrator; and Rebecca Dockter, FWP Chief Legal Counsel.
4. TFMPL's costs of the proceeding, Mont. Code Ann. § 2-2-136(2)(c). TFMPL has requested attorney fees and costs. Only costs, and not attorney fees, are allowed under Mont. Code Ann. § 2-2-136(2)(c). There were no depositions conducted in this matter, and FWP voluntarily delayed TFMPL payment on any witness fees until a later date. TFMPL incurred reasonable and necessary expenses of printing paper for the hearing which should be reimbursed by FWP, Mont. Code Ann. § 25-10-201. The undersigned further recommends that Montana Fish, Wildlife and Parks pay the TFMPL's witness fees and mileage in this matter. Mont. Code Ann. § 25-10-201(1). To the extent legally necessary, the Hearings Examiner recommends the costs are specifically attributable to the policy actions and omissions of Jeff Hagener, FWP Director; Ron Aasheim, FWP

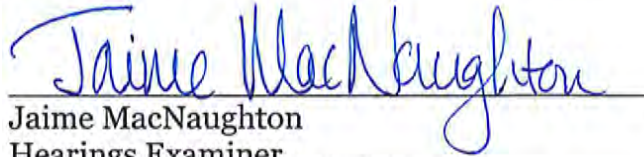
Communications and Education Division Administrator; and Rebecca Dockter, FWP Chief Legal Counsel.

5. COPP's costs of the proceeding, Mont. Code Ann. § 2-2-136(2)(c). Through use of in-house counsel as a Hearings Examiner, the Commissioner was able to substantially reduce the costs which might have been otherwise assessed against an individual employee of officer. The Commissioner, in addition to state employee time and resources, did incur a cost of \$350 for a court reporter for the hearing. The Hearings Examiner recommends DENIAL of entry of the COPP's costs of the proceeding against the FWP.
6. There is no evidence on the record that would support a finding that FWP should be responsible for MTA's use of the state property for advocacy purposes at the May 10 Hamilton Farmers Market, Youth Conservation and Education Expo, Corvallis voting booths or Lolo Schools polls, Elk Extravaganza, MTA Rendezvous.
7. Exhibits 4, 6 and 18 are ADMITTED into the record, and were only considered for the purpose of supplementing evidence in the record, including stipulated exhibits, stipulated findings of fact and testimony provided at the hearing, Mont. Code Ann. §2-4-604(4).
8. FWP's objections to harmonizing statutes regarding the same subject matter are DENIED. It is appropriate for the court to consider and harmonize all statutes on the same subject, in order to give meaning to the legislature's enactments, Mont. Code Ann. § 1-2-101, *Yellowstone Fed. Credit Union v. Daniels*, 2008 MT 111, ¶ 18, 342 Mont. 451, 181 P.3d 595.

By making these recommendations, the Hearing Examiners concludes participation in this matter.

Once the Commissioner either accepts or modifies the Hearings Examiner's recommendation in a final agency order, either party may seek judicial review of the Commissioner's determination pursuant to Montana Code Annotated Title 2, Chapter 4, part 7, Mont. Code Ann. § 2-2-136(3). The parties are further informed that the complaint, record established, and decision are available for public inspection upon issuance of the Commissioner's final determination, Mont. Code Ann. § 2-2-136(4).

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of November, 2016.



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### CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be hand delivered to:

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DATED this 22<sup>nd</sup> day of November, 2016.

